IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0191

RENEE NEARY, as parent and guardian of Dylan Dallaserra: **KRISTI LUCAS and ALICE JEAN SPEARE**, each individually and as representative members of a class of similarly situated plaintiffs,

Appellees/Plaintiffs,

vs.

BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., a Montana licensed health service corporation; and **MONTANA COMPREHENSIVE HEALTH ASSOCIATION**,

Appellees/Defendants.

BRITTANY C. SMITH, individually and as a member of a similarly situated class,

Appellees/Plaintiffs,

vs.

BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., a Montana licensed health service corporation,

Appellees/Defendant.

KRISTI LUCAS, ALICE JEAN SPEARE, BRITTANY C. SMITH, MONTANA COMPREHENSIVE HEALTH ASSOCIATION, AND BLUE CROSS AND BLUE SHIELD OF MONTANA, INC.'S JOINT MOTION TO DISMISS

Appeal from the District Court of the Second Judicial District
of the State of Montana in and for the County of Silver Bow
Cause No's. DV-08-553 and DV-09-401
The Honorable Bradley G. Newman

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INTRODUCTION

Kristi Lucas, Alice Speare, Brittany Smith, Montana Comprehensive Health Association, and Blue Cross and Blue Shield of Montana, Inc., (hereinafter "the Parties") respectfully and jointly move this Honorable Court for an order dismissing the Appeal filed by the Applicant Intervenors ("Applicants") of the district court's denial of their motion to intervene. Such denial of a motion to intervene is not an Order from which an Appeal may be had pursuant to Rule 6, Montana Rules of Appellate Procedure, which sets out those judgments or orders from which an appeal can be taken, and when.

It is a well settled premise of Montana law that a denial of a motion to intervene is not one of those judgments from which interlocutory appeal may be taken. *State ex. rel. Palmer v. The District Court of the Ninth Jud. Dist.*, 190 Mont. 185, 187, 619 P.2d 1201, 1203 (1980) (citing Rule 1, Montana Rule of Appellate Procedure). The current Rule 6's predecessor, Rule 1 is identical to the current Rule 6 in regard to appeal from a motion denying (or granting) intervention. The appeal is therefore procedurally deficient and should be dismissed.

In accordance with Rule 16(1), M. R. App. P., one of Appellants' counsel was contacted concerning the motion and Appellants' attorneys object to this motion.

ARGUMENT

Rule 6 of the Montana Rules of Appellate Procedure governs what judgments and orders are appealable. It does not provide for interlocutory appeal

of the denial (or grant) of a motion to intervene. *See*, Rule 6, M. R. App. P. (2009). Rule 6 is a revision of the former Rule 1, which revision was adopted by this Court in 2007. Then Rule 1 stated in relevant part:

> (b) In civil cases a party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:
>
> (1) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.
>
> (2) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.
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> * * *
>
> (c) All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under R.C.M. 1947, section 93-2906, subdivision 4 thereof or subsection (2) or (3) of section 25-2-201, Montana Code Annotated, may be raised and reviewed on an appeal from the judgment.
>
> Rule 1, M. R. App. P. (2005)

In addition to being absent from both Rule 1 and now Rule 6, this Honorable Court clearly stated that a denial of a motion to intervene is not a judgment from which appeal may be taken pursuant to the previous Rule 1, M. R.

App. P. Only those orders or judgments set out in the appellate rules are those from which an appeal may be taken. *State ex. rel. Palmer,* 190 Mont. at 187, 619 P.2d at 1203. "The fact that the rule does not provide for appeals from orders denying intervention is fatal to this present action." *Continental Ins. Co. v. Bottomly*, 233 Mont. 277, 279, 760 P.2d 73, 75 (1988). Appellants may have a right of appeal once the judgment is final, but no interlocutory appeal is available now. *In Re Custody of R.R.K*, 260 Mont. 191, 202, 859 P.2d 998, 1005 (1993); *Estate of David Schwenke v. Becktold*, 252 Mont. 127, 130-131, 827 P.2d 808, 810 (1992); *accord, Whitefish Credit Union Assn., Inc. v. Glacier Wilderness Ranch, Inc.*, 242 Mont. 471, 474, 791 P.2d 1363, 1365 (1990) (Order granting intervention is also interlocutory and not appealable). Here, the matter in the court below is not finally concluded, there is not a final judgment, nor a judgment certified under the applicable Rules. Exhibit A (Order denying intervention).

As indicated by Applicants' Notice of Appeal, the case below continues, and they argue their appeal is based on the premise that the order is "final" as to them. However, Applicants' stated legal basis is not provided for in Rule 6, M. R. App. P., nor supported by this Court's previous rulings on this issue. As a result, the appeal must be dismissed.

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CONCLUSION

For the foregoing reasons, the Parties hereto respectfully request that this Honorable Court find that this motion is well taken and dismiss Appellants' appeal because it is not an order from which appeal can yet be taken.

Respectfully submitted this 27th day of April 2010.

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CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing **KRISTI LUCAS, ALICE JEAN SPEARE, BRITTANY C. SMITH, MONTANA COMPREHENSIVE HEALTH ASSOCIATION, AND BLUE CROSS BLUE SHIELD OF MONTANA, INC.'S JOINT MOTION TO DISMISS** was served upon the following by mailing a true and correct copy thereof on April 27th, 2010, addressed as follows:

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MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

RENEE NEARY, as parent and guardian of Dylan Dallaserra, KRISTI LUCAS, and ALICE JEAN SPEARE, each individually and as representative members of a class of similarly situated plaintiffs, Plaintiffs, vs. BLUE CROSS AND BLUE SHIELD OF MONTANA, INC., a Montana licensed health service corporation, and MONTANA COMPREHENSIVE HEALTH ASSOCIATION, Defendants.	Cause No. DV-08-553 (Cause No. DV-09-401 has been consolidated with this action) **ORDER DENYING MOTIONS TO INTERVENE**

This matter is before the Court on motions to intervene. The motions have been fully briefed. The Court conducted a hearing on the motions on March 19, 2010. During the March 19th hearing, the Court heard testimony from one of the applicants for intervention, Tyson Pallister. The Court also heard argument from counsel for the respective parties. Accordingly, the motions to intervene are deemed submitted on the briefs and the record.

The applicants for intervention contend that they are entitled to intervene as a matter of right or, in the alternative, that they should be permitted to intervene in the interests of justice. Rule 24, M.R.Civ.P., governs intervention.

Intervention as a matter of right is governed by Rule 24(a), which provides:

EXHIBIT A

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Permissive intervention is governed by Rule 24(b), which provides in relevant part:

> Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The two consolidated individual and class actions pending before this Court involve Plaintiffs' claims that Defendants have violated their "made whole" rights under their insurance contracts. These cases are among several actions pending in various courts related to the Montana Supreme Court's ruling in *Blue Cross and Blue Shield v. Montana State Auditor and Commissioner of Insurance*, 2009 MT 318, 352 Mont. 423, 218 P.3d 475, which invalidated a health care insurance policy exclusion for medical costs covered by an existing automobile insurance policy or an existing premises liability policy.

The applicants for intervention include Tyson Pallister, Kevin Budd, Jeanette Diaz and Jessica Normandeau.

Both Rule 24(a) and Rule 24(b) provide that consideration of a motion to intervene begins with a determination of whether the motion is timely. Timeliness is a threshold issue. *In Re Adoption of C.C.L.B.*, 2001 MT 66, ¶22, 305 Mont. 22, 22 P.3d 1046. Rule 24 does not provide any criteria by which the timeliness issue is to be determined. As a result, the issue rests within the discretion of the trial court. *In Re C.C.L.B.*, 2001 MT 66, ¶23.

The current parties to these consolidated cases object to the timing of the applicants motions to intervene. The parties note that the applicants did not seek intervention from the December 2008 commencement date of Cause No. DC-08-533 until late January 2010, after the

applicants learned of the parties' intent to stipulate to the class certification and to enter into a settlement agreement. The parties also note that they already have participated in mediation. While the applicants could have acted sooner, the Court is not inclined to reject their motions on the issue of timeliness. In light of the number of related cases pending in state and federal court, and of the complexity of the cases, whatever delay occurred in the filing of the motions to intervene may be excused. The Court has not yet certified the class in the instant cases, and the parties' stipulations as to the class content, the class notices and the proposed settlement have not yet been approved.

With respect to the merits of the applicants' motions, the Court next considers whether intervention is appropriate under subsection (1) of Rule 24(a) or subsection (1) of Rule 24(b). The applicants have not cited any statute that confers upon them an unconditional or a conditional right to intervene. Resolution of the motions to intervene, therefore, depends upon an analysis of the criteria set forth in subsection (2) of the respective rules.

With respect to intervention as a matter of right under Rule 24(a), an applicant must meet four criteria: (1) the motion must be timely; (2) the applicant must have an interest in the subject matter at issue; (3) the applicant must have an interest which may be impaired by the disposition of the case; and (4) the applicant must have an interest which is not adequately represented by an existing party. *Estate of Schwenke v. Becktold*, 252 Mont. 127, 131, 827 P.2d 808, 811 (1992).

As noted above, in light of the procedural status and circumstances of these consolidated cases, the motions to intervene are not deemed untimely.

Applicant Diaz is not insured by Blue Cross and Blue Shield or by Montana Comprehensive Health Association. Rather, the record indicates that she is a member of the State of Montana's self-funded employee welfare benefit plan, over which Blue Cross and Blue Shield acts as a third-party administrator. She already is a party to a separate state court action in

the First Judicial District Court concerning her claims. Under such circumstances, Diaz's claims are distinct from Plaintiffs' interest in the consolidated cases. Moreover, Diaz's distinct claims will not be impaired by the disposition in these cases. Diaz is not entitled to intervene as a matter of right.

Applicant Budd also cannot intervene as a matter of right. The record indicates that he is not a potential class member because the insurance policy exclusions in the instant cases were never applied to claims filed with Blue Cross and Blue Shield by his health care providers.

The current parties to these cases do not contest that Applicants Pallister and Normandeau are potential class members. Pallister, however, also is a party together with Budd in a federal court action against Blue Cross and Blue Shield seeking ERISA relief. The record also indicates that Normandeau is an ERISA plan member and that she is represented by one of the law firms prosecuting the federal court action to which Pallister and Budd are parties. For these reasons, disposition of these consolidated cases will not adversely impact Pallister and Normandeau's interests. They are free to opt out of the class certified in these cases and to pursue their claims in federal court.

Additionally, the Court finds that Pallister and Normandeau have not met their burden of making a "compelling showing" that the current class representation is inadequate. *State ex rel. Palmer v. Montana Ninth Judicial District Court*, 190 Mont. 185, 189, 619 P.2d 1201, 1204 (1980). The applicants' interest in the proposed settlement in no different than that of any other potential class member. As noted, the applicants may choose to opt out of the class. They also are free to remain in the class and to voice their objections to the proposed settlement at the fairness hearing. For the above-stated reasons, Pallister and Normandeau are not entitled to intervene in these cases as a matter of right.

The Court next considers the applicants' motions to intervene under the permissive standard of Rule 24(b). Once again, the Court will not dismiss such motions as untimely.

Pursuant to Rule 24(b)(2), the applicants must show that their claims and the instant consolidated cases have a question of law or fact in common. Upon such a showing, the Court then exercises its discretion to insure that permissive intervention does not unduly delay or prejudice the rights of the current parties.

Applicant Diaz's claims against Blue Cross and Blue Shield as the third-party administrator of her benefit plan do not share a common question of law or fact with Plaintiffs' claims against Defendants as members of Blue Cross and Blue Shield or Montana Comprehensive Health Association health insurance plans. Applicant Budd's claims also are not common in law or fact to Plaintiffs' claims because the policy exclusions at issue in these consolidated cases were not applied to the insurance claims submitted by his medical providers.

Applicant Pallister's ERISA-based claims are common to Plaintiffs' claims in these cases. The policy exclusions were applied to medical claims submitted to Blue Cross and Blue Shield by his medical providers. Similarly, Applicant Normandeau's claims are common to Plaintiffs' claims. At least some of her medical claims were subject to the same policy exclusions.

As to Applicants Pallister and Normandeau, however, permissive intervention is not necessary or appropriate at this time. The current parties have engaged in substantial discovery, negotiation and mediation. The granting of permissive intervention to Pallister and Normandeau at this stage of these proceedings would result in undue delay and prejudice to the class members. As noted above, Pallister and Normandeau are free to remain in the class, to have their common interests advanced by the current Plaintiffs, and even to object to the proposed

settlement. Pallister and Normandeau also are free to opt out of the class and to pursue their claim in the separate existing court actions.

The Court is not persuaded by the applicants' argument that jurisdiction over the ERISA class claims is not proper in the state court. Under ERISA, claims for denial of benefits are brought pursuant to Section 502(a)(1)(B), which provides for concurrent jurisdiction in the state and federal courts over such claims. 29 U.S.C. §1132(e). Applicants Pallister and Budd have asserted Section 502(a)(1)(B) claims for denial of benefits. They also have raised Section 502(a)(2) or (3) claims for breach of fiduciary duty. The federal courts have exclusive jurisdiction over such fiduciary claims. However, the equitable relief afforded for such fiduciary claims is not available to Pallister, Budd or other potential ERISA class members where there is a claim of wrongful denial of benefits. The denial of benefits claims must be made under Section 502(a)(1)(B), and not as claims for breach of fiduciary duty. See, for example, *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996).

For the reasons stated above,

IT IS ORDERED that the motions to intervene of Applicants Tyson Pallister, Kevin Budd, Jeanette Diaz and Jessica Normandeau are denied.

DATED this 8th day of April, 2010.

Brad Newman
District Judge

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